Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF THE COMPETITION POLICY INSTITUTE

ON THE

NOTICE OF INQUIRY

Philip J. Weiser
Associate Professor
University of Colorado School of Law
Campus Box 401
Boulder, CO 80309

Of Counsel

Ronald J. Binz, President
Debra R. Berlyn, Executive Director
1156 15th St. N.W. Suite 520
Washington, D.C. 20005
Phone: 202-835-0202
Fax: 202-835-1132

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COMMENTS OF THECOMPETITION POLICY INSTITUTE

The Competition Policy Institute (CPI), respectfully submits these comments in response to the Notice of Inquiry (Notice) of the Federal Communications Commission (Commission) concerning high-speed access to the Internet over cable and other facilities. CPI is a non-profit organization that advocates state and federal policies to bring competition to energy and telecommunications markets in ways that benefit consumers. The issues raised in the Notice are of utmost importance to the future of competition for Internet services and growth in related telecommunications markets. CPI appreciates the opportunity to comment in this important inquiry of the Commission.

I. INTRODUCTION AND SUMMARY

In its Notice, the Commission seeks to determine what regulatory treatment, if any, should be accorded to "cable modem" service – high-speed access to the Internet using facilities heretofore used mainly to provide video programming to cable television customers. The Notice appropriately conveys the import of this decision. We are in the midst of a continuing revolution in the way consumers communicate, use data, educate and entertain themselves. Decisions to regulate or not regulate will inevitably shape this revolution.

In these Comments, CPI responds to several of the questions posed by the Commission in the Notice. Here are the main conclusions we reach:

- The Commission's policy of regulatory restraint appears to be justified: competitors, using a variety of current access technologies, are emerging and cable companies are opening their platforms, offering contractual arrangements to Internet Service Providers without a regulatory mandate to do so.

- The Commission's decision of how to classify cable modem service and whether to regulate the service should be outcome-oriented: the Commission has substantial discretion in how to classify the service and should thus consider the effect of its decision

on competition in the broadband marketplace and the options it reserves for itself in the future.

- The Commission should not attempt, through preemptive regulation, to achieve what the marketplace (aided by antitrust laws) is capable of producing.

- Cable modem service and similar services delivered by other technologies do not fit well into any existing regulatory classification provided by the Communications Act. In essence, the newness of these services reflects the newness of the Internet and its applications. The optimal approach would be to view these services as a new category of services called "broadband Internet access services."

- Even if the Commission determines that cable modem service has a telecommunications component, no further regulatory action is needed at this time. At most, the Commission should tentatively decide that cable modem service is a deregulated telecommunications service under Title II of the Communications Act, exercising its discretion under Section 10 of Title I to forbear from regulating the service.

II. THE COMMISSION'S DECISION OF WHETHER TO REGULATE CABLE MODEM SERVICE SHOULD BE RESULT-ORIENTED AND SERVE SEVERAL POLICY GOALS.

In determining whether to regulate cable modem service, the Commission should be mindful of several policy goals. These include: (1) encouraging deployment of facilities that provide advanced services to the widest possible spectrum of Americans; (2) encouraging competition among providers of broadband service; (3) maintaining neutrality among the technologies that provide broadband internet services; and (4) removing regulation where the public interest is served by that action.

These four goals might be considered the primary or immediate objectives of Commission activities in this emerging market; they relate to "enabling" actions that will permit a fully competitive marketplace in broadband services to develop. Importantly, we do not list "open access" as an explicit goal of federal policy applied in this area, requiring specific Commission action at this time. While CPI strongly supports "open access" as an outcome and a characteristic of the emerging competitive market for broadband services, open access is

properly viewed as a derived goal or outcome. Simply put, regulation cannot know now exactly what a regime of open access should look like: rather, it is advisable to accept and endorse the access model that develops as a result of competition in the broadband market. In that regard, we discount claims that providers of cable modem service have either the incentive or the ability to create a "closed Internet," whatever that might be. Instead, we expect these providers to be driven by market forces to share their networks with numerous purveyors of information and Internet applications. Regulation should avoid overrunning its headlights by attempting to create, *a priori*, an open access requirement before knowing the capabilities of the technology, the extent of consumer demand, and the applications of the service.

We also do not list preservation of the *status quo* in the Internet Service Provider market as a policy goal. The transition we are witnessing is not simply a quantitative change in the bit rate of a consumer's access line. It is a qualitative transition from a largely narrowband Internet with analog dial-up access to a system in which consumers are linked digitally to the Internet through a continuous broadband connection. In this new world, it is unresolved how many ISPs should survive the transition, or even what role an ISP will play.

The first goal, encouraging the deployment of broadband facilities, is best served by Commission action that exposes firms to the rewards (and the risks) of their capital investments in this infrastructure. Except for extra-market goals like universal service, regulation is inferior to market forces in apportioning capital and directing its use. The Internet itself, a network of mostly private networks and the connecting infrastructure, is the perhaps the best example of an industry requiring significant capital investment that exploded onto the scene without much direction or aid from regulation.

The second goal, encouraging competition among broadband providers, is closely related to the first. While many analysts understand that investment in telecommunications infrastructure facilities is the *sine qua non* of competition, the converse is also true: capital investment applied in this area will make competition inevitable. Even if the firms who make the original investment fall away, successive owners of the infrastructure will view their investment as sunk and look to marginal revenues and new markets -- the fuel of competition.

The third goal, competitive neutrality among competing technologies, requires the Commission to view providers of broadband access similarly, regardless of the specific technology used or, more pointedly, regardless of the provenance of that technology. Multiple broadband access channels will soon be available to many residential and business consumers: cable, DSL, satellite, wireless and even unlicensed spectrum. As trite as the words have become, the Commission should not attempt to pick winners among these technologies or to sort them out depending on their regulatory history.

The fourth goal, reducing regulation, is explicitly contemplated by the Telecommunications Act of 1996: Section 10 of Title I equips the Commission with authority to forbear from applying provisions of the Communications Act when such regulations are not necessary to protect consumers and when such forbearance serves the public interest.

III. THE COMMISSION'S DECISION IN THIS INQUIRY SHOULD BE GUIDED BY THE PRINCIPLES AND LESSONS OF ANTITRUST LAW

In order to facilitate the competition that will bring consumers greater choices, higher quality products and better prices in the emerging broadband marketplace, the Commission should follow the antitrust approach of reacting to marketplace developments rather than proactively assuming the emergence of a monopoly that warrants regulation. Viewed through

the lens of antitrust, forced sharing or unbundling mandates should be imposed only where (1) doing so will prevent the use of market power in one market to disadvantage competition in a second market; or (2) it is necessary to facilitate competitive entry into a market where a company's entrenched monopoly power would be extraordinarily difficult to overcome.[1]

Antitrust imposes unbundling requirements only where a company has abused an established monopoly.[2] This approach is rooted in an understanding of the effects (and the limitations) of regulation. Put simply, whatever benefits regulation can claim, interfering in the operation of a competitive market imposes real societal costs – in terms of devising and implementing a regulatory regime as well as its impact on incentives for investment[3] – and should never be undertaken lightly. By implementing an ambitious regulatory response, the Commission will not only take on a costly task, but it will, as the esteemed Professor Areeda put it, remove "some or all of the incentive [for rivals to the cable broadband providers] to produce an alternative to the input on their own."[4] For these reasons, the antitrust approach requires an initial showing that such a step is warranted before implementing a more intensive regulatory model.[5]

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1 A number of antitrust doctrines address this question, most notably the "essential facility" doctrine, which stems from the 1912 Supreme Court decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). In short, this doctrine – like other relevant ones such as tying and exclusive dealing -- has focused most intently on the consequences of "vertical integration." *See* IIIA AREEDA, ET AL., ANTITRUST LAW ¶ 771a, at 172 (1995).

2. *See* United States v. Microsoft Corp., 65 F. Supp. 2d 1, 41 (D.D.C. 1999).

3. As Professor Areeda succinctly explained with regard to forced licensing of patents, "diminishing the inventor's reward reduces incentives for inventive activity and seems inconsistent with the premise of the patent system." III AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 707, at 180 (rev. ed. 1996); *see also, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (explaining that the limited copyright monopoly "is intended to motivate the creative activity of authors and inventors by the provision of a special reward"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

4.IIIA AREEDA & HOVENKAMP, *supra* note 1, ¶ 774c, at 220.

5 *Cf.* AT&T v. Iowa Utils. Bd., 525 U.S. 366, 428 (1999) ("given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or 'unbundled') where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available.") (Breyer, J., concurring in part and dissenting in part).

Antitrust law also teaches that even a monopolist should not be asked to lend a helping hand to its competitors where the competitors could succeed on their own. Thus, a company who sold telex equipment to be used on Western Union's telex network did not have a right to demand the Western Union's sales lists where others had demonstrated the ability to stay in business through building their own sales' lists.[6] In the case of broadband connectivity (unlike the incumbent telephone providers' local loops and other unbundled network elements used in the narrowband local telephone market) there are clear alternatives emerging in the marketplace, making it premature to deem one facility as the "killer pipeline" that will evolve into a monopoly in this market. Indeed, the success that the incumbent telecommunications carriers are enjoying with Digital Subscriber Line (DSL) services deployed in response to the rollout of cable broadband service suggests that the cable access will not sustain even a majority share of the market.[7] Moreover, other technologies, like satellite and wireless, will vie for the same customers. Recognizing the importance of allowing new markets to develop, the Commission has declined to mandate the unbundling of the new broadband technologies being deployed in the ILEC's network – packet switches and DSLAMs.[8]

Finally, the antitrust perspective suggests that less intrusive measures should be used before more intrusive ones are deployed. In this market, specific market combinations that might raise a distinct rationale for regulatory intervention, such as the pending AOL/Time

6. *See* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 377–78 (7th Cir. 1986) (concluding that new entrant had no right to its competitors' sales lists).

7. *See* Michael Powell, *June 15, 1999 Remarks Before the Federal Communications Bar Association (Chicago Chapter)* (visited Feb. 14, 2000) <http://www.FCC.gov/Speeches/Powell/spmkp902.html> ("[U]pgrades to cable plant have intensified a potential competitive threat that has led, I believe, to heightened investment in alternative broadband technology by other firms."); *Hearing on Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies Before the Senate Judiciary Committee* (testimony of Kevin M. Moore, Director, Deutsche Banc Alex. Brown), July 14, 1999 (visited Feb. 14, 2000) <http://www.senate.gov/~judiciary/71499kmm.htm> ("We believe that it is the success of the cable modem that is causing the current wave of RBOC [regional Bell operating company] investment in DSL services. . . . We believe that the primary reason for lack of innovation is that ultimately, every new innovation either creates opportunities for RBOC competitors and/or cannibalizes existing services, neither of which is good for the RBOCs.").

Warner merger, should be dealt with on a case-by-case basis. Similarly, if certain firms employ practices that actually interfere with related, downstream markets by, say, degrading access to Internet content provided by competitors, those actions should be addressed. But a new regulatory mandate to unbundle cable's broadband transport service is plainly more protection than is needed and runs against the basic lessons of antitrust.

IV. DEFINITION OF OPEN ACCESS

In the Notice, the Commission seeks comments on how to define "open access." As we noted earlier, our preference is to subordinate that answer to the outcome of the competitive contest in the broadband marketplace. But we also note that many "open access" proponents do not clearly identify what exactly they are requesting the Commission to do in imposing an "open access" regime. To the extent that "open access" entails the unbundling of high speed transport from content (along with establishing a regulated wholesale rate for access to the transport), this approach – at least without a showing of market power and a clear likelihood that the power would be abused – would ignore lessons from antitrust law, as we noted earlier.

A separate question is whether a company providing broadband transport is actually using market power in the transport market to degrade access to Internet content or is denying access entirely. Such discrimination, if it actually occurs, would provide a very different justification for regulation and would actually call for a different form of regulation than mandating unbundled access to the underlying plant. (By way of analogy to the Telecom Act's local competition provisions, an unbundling regime for cable broadband transport would parallel Section 251(c)(3)'s unbundling regime and a non-discrimination requirement would parallel the interconnection regime in Sections 251(a)(1) and 251(c)(2) for incumbent LECs.) Finally,

8. *See* Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Release

because the type of discrimination in access to content that would compromise the Internet's open design seems unlikely to occur, enforcing such a requirement would not entail nearly the costs involved with superintending an unbundling regime.

The Internet's value as a network reflects the incredibly large number transactions that it makes possible and the multitude of applications being designed for it. This "network effect," as explained in the economic literature, stems from the virtuous cycle that the more persons who use the Internet, the more applications are made available for it, thus spurring even more usage.[9] In the same way that this dynamic unfolded when most access was narrowband, there is every reason to believe that the same dynamic will hold true in the broadband world.

One recent example of the continued openness in broadband services provides support for the theory that a cable modem provider has a constrained incentive (or at least limited ability) to discriminate on access to downstream applications. As the Commission is well aware, the most recent "killer application" to ride on the Internet generally, and broadband connections in particular, is the use of Napster to exchange digital music through a file sharing technology. This application continues to grow in popularity, despite the lawsuit by members of the recording industry, including Warner Brother Records. Nonetheless, despite a clear theoretic incentive to limit access to Napster, Time Warner does not limit access to Napster over cable modems on its Warner Cable systems. The reason is obvious: if it dared to do so, Time Warner would risk losing the business of consumers for high-speed Internet access who could switch to (or choose in the first instance) a DSL connection. Indeed, in network industries, companies like Apple Computer that have attempted to limit access to its information platform (in that case, its

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No. FCC 99-238, at ¶ 8 (Sept. 15, 1999).

[9] *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 173-226 (1999).

operating system) have suffered in the marketplace.[10] For this reason, many expect the cable companies to voluntarily open up to resellers of broadband access.[11]

Given the nature of the Internet, ISPs and content providers must make the case for carriage and quality interconnection within a market by providing a value-added service. In the narrowband world, ISPs received "dial-up" calls and translated analog narrowband connections into Internet traffic, serving a useful and valuable purpose. To the extent that the same ISP provides only a gateway for "access" in a broadband world, we must ask what value it is adding to the existing service. To the extent the ISP does develop, say, a reputation for reliability, security, support, etc., that added value will be attractive to a cable company who will want to offer that value on its network, as opposed to the DSL or wireless networks of its competitors..

V. THE COMMISSION SHOULD CLASSIFY CABLE MODEM SERVICE (AND RELATED COMPETING SERVICES) IN A NEW SERVICE CATEGORY OR, ALTERNATIVELY, AS A DEREGULATED TELECOMMUNICATIONS SERVICE.

Sorting out the policy direction is only half the battle. The Commission must also find a way to develop a legally viable model under the Telecommunications Act of 1996 to classify cable broadband service as well as other related technologies, such as DSL and possibly Internet

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10. As one analyst explained:

> Consumers who, at comparable prices and speeds, can get unlimited choice of content over the telcos vs. limited choice over their cable network are not likely to opt for the cable network. Beta v. VHS and Apple vs. Microsoft both tell us that customers primarily care about content and applications and will flock to the vendor that gives them the best and widest selection of each.

Competition and Consumer Choice in High-Speed Internet Services and Technologies: Hearings on Broadband Before the Senate Judiciary Comm. 3 (July 14, 1999) (statement of Anna-Maria Kovacs, First Vice President, Janney Montgomery Scott), *available at* (visited Mar. 21, 2000) <http://www.senate.gov/~judiciary/71499amk.htm> .

11. Moore, *supra* note 55, at ¶ 4 ("We believe that AT&T would rather have the online providers utilizing its facilities instead of someone else's."); *see also Hearings*, *supra* note 64, at 2 (testimony of Anna-Maria Kovacs) ("I believe that the deployment of DSL, in turn, will spur the cable industry to insure that it offers consumers a choice in content, content providers, and gateways that is comparable to what the telcos can offer."); *Few Regulatory Obstacles Seen For AOL Time Warner*, COMM. DAILY, Jan. 11, 2000, *available in* 2000 WL 4694269 (reporting that "'[t]here's not many cases of closed access working very well, restricting content to one location and making people come to you . . . . It would be a mistake for them to limit consumers to only AOL or Time Warner content, and I think they get that.'").

backbone service. As the Commission suggests in its Notice, none of the four possible classifications is an obvious fit.

As the Ninth Circuit's decision in *AT&T v. Portland* suggested, there is a "telecommunications" component to cable broadband service that might make it the most obvious box to place the service in.[12] In the sense that the high speed transport of data in two directions resembles DSL, which is classified as such, this definition might appear appropriate. On the other hand, it is quite clear that the cable modem service presently provides a combined transport and content offering, distinguishing it from a telecommunications service. Further, the product uses facilities that Congress has specifically determined should be regulated under Title VI of the Communications Act.

Second, while this combined offering is delivered over the cable plant subject to regulation under Title VI of the Communications Act, it is not what one might comfortably term a cable service. Third, since the cable modem technology does not simply store and process information – as a narrowband ISP does – it is at least inexact to classify it as an information service. Finally, there is a possibility, as noted in the FCC *amicus* brief to the Ninth Circuit, that Section 706 classification might be appropriate for this and similar services. This is an intriguing possibility, permitting the Commission to view these services in a new light. We think the Commission should explore this option further.

Given these difficulties in developing a regulatory model, we recommend that the Commission commence a Notice of Proposed Rulemaking that would begin with the conclusion that it will decline to mandate unbundling of the cable plant (while inviting evidence of the type of discrimination that would warrant correction) as well as a tentative conclusion that cable broadband transport (as well as other similar technologies) be

classified under Section 706 or as an unregulated Title II telecommunications service. If the Commission pursues the unregulated Title II model, it would need to define and justify its forbearance from most, if not all, common carrier regulation that would usually apply to "telecommunications services." But the Commission, with respect to wireline long distance, for example, has already begun to develop this model by forbearing from price regulation and the general requirement that telecommunications carriers file tariffs. With respect to cable modem service, as well as similarly situated services, we recommend that the Commission further develop this regulatory classification (or a comparable regime under Section 706) in order to encourage the continued deployment of broadband while making clear that regulatory obligations could be imposed should future developments warrant it.

VI. CONCLUSION

The Commission has prudently declined to apply common carrier regulation to cable modem service to this point. Developments in the market for broadband access simply do not provide a compelling reason to impose such regulation and, in fact, demonstrate that the Commission has not erred in its policy choice. The advanced services made available through cable modem service and its competitors are finding their way to a growing number of Americans. New technologies, such as broadband wireless and direct broadcast satellite are emerging as competition to both cable modem service and its strongest rival, DSL provided over traditional wireline telecommunications facilities. In light of these developments and the lessons from antitrust, the Commission should develop a regulatory model – either under Section 706 or as an unregulated service under Title II – that declines to impose unbundling requirements on

[12] 216 F.3d 871, 877-79 (9th Cir. 1999).

cable modem service and related competing services, but which model could provide a basis for any regulation that might be warranted in the future.

Respectfully submitted,

COMPETITION POLICY INSTITUTE

/s/
Ronald J. Binz, President
Debra R. Berlyn, Executive Director

Competition Policy Institute
1156 15th St., NW Suite 520
Washington, D.C. 20005

Philip J. Weiser
Of Counsel